No. 83-2062

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prosecutor's comment on the state of the evidence in the case may constitute Griffin error simply because it tangentially refers to the defendant's silence?

2. Whether a trial court is obligated to grant immunity to defense witnesses simply because the defense claims the witnesses can offer some exculpatory evidence?

3. Whether a question by the prosecutor and some comments by the prosecutor during closing argument require the granting of review by certiorari when the question and comments had no fundamental effect on the trial and do not have any constitutional implications?

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OPINION BELOW

The California Court of Appeal, Fourth Appellate District, Division One, received petitioner's direct appeal from a judgment of conviction as well as a petition for habeas corpus. In a published opinion, the court affirmed the convictions and denied petitioner's request for habeas relief.

(Petn., App. A; In re Martin (1984) 150 Cal.App.3d 148.)

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix A.

STATEMENT OF THE CASE

A jury found petitioner guilty of conspiracy to commit extortion (Pen. Code, §§ 182, subd. 1; 518), conspiracy to commit assault with a deadly weapon (Pen. Code, §§ 182, subd. 1; 245), second degree murder (Pen. Code, § 187) and assault (Pen. Code, § 240). The jury also found petitioner had been armed with a firearm during the conspiracies and the murder (Pen. Code, § 12022, subd. (a)). (Petn., App. A.)

Petitioner was sentenced to state prison for a term of 15 years to life for the murder and a one year enhancement was also imposed. Sentencing on the conspiracies was stayed. (Pen. Code, § 654.) Petitioner was given a concurrent six month sentence on the assault with a deadly weapon charge. (Petn., App. A.)

In a published opinion, the California Court of Appeal, Fourth Appellate District, Division One affirmed the convictions and denied petitioner's request for habeas corpus relief. (In re Martin, supra, 150 Cal.App.3d 148; Petn., App. A.)

The California Supreme Court declined to consider petitioner's case on appeal or on habeas corpus. (Petn., App. C.)

Petitioner has petitioned this Court for a writ of certiorari in this case based on the appeal (83-2062) and in the case arising out of the habeas corpus petition (83-2057). A response has already been filed in 83-2057.

STATEMENT OF FACTS

The facts are adequately set forth in the opinion of the California Court of Appeal, Fourth Appellate District, Division One and are as follows:

> "La Jolla attorney Richard Crake was murdered by Andrew James Powell on May 12, 1981. The death was probably the result of a severe blow to the head. Briefly, in the light most favorable to the judgment, the evidence shows Martin and Crake were embroiled in civil litigation arising from a dispute over a real estate transaction at the Sports Arena Square shopping center. During the course of discovery Martin became dissatisfied with the posture of

the litigation. During a deposition Martin had threatened Crake with violence.

"Michelle Goff worked for Martin's insurance company. Powell was Goff's boyfriend and she introduced him to Martin. Martin hired Powell on March 23, 1981. Martin knew Powell could not make his child support payments. Martin also knew Powell was afraid he would be jailed for failure to pay. Martin used this as leverage and told Powell he wanted Powell to collect money Crake owed Martin. Martin told Powell to collect $100,000 from Crake and to beat him up.

"Martin gave Powell Crake's picture and business address. When Powell would not go to Crake's business, Martin supplied Crake's home address. Powell and a friend went to this address but discovered Crake no longer lived there. Powell called Martin long distance to tell him this address was incorrect.

"Martin obtained Crake's new address by contacting United States Marshal James Murphy telling Murphy he needed the address to serve papers in conjunction with his civil suit. Murphy provided Martin with Crake's address.

Martin gave this address to Powell along with the keys to Martin's car and a bag containing a gun.

"Powell and a friend drove to Crake's house on May 12, 1981. They arrived at the guard station at approximately 9 p.m. Powell gave the guard a false name. The Crake family had returned from dinner approximately 9 p.m. Powell and his friend rang the doorbell and Crake answered. Powell sent the friend to the car and then told Crake he was there to collect $100,000 for Martin. Powell and Crake got into a fight. Powell shot Crake in the arm with Martin's gun. Powell hit Crake in the head with the gun between six and sixteen times. The blows eventually caused Crake's death. Crake's wife attempted to stop Powell but he pushed her away and fired the gun at her. Crake's daughter threw shoes and books at Powell.

"Powell covered with blood returned to the friend's car. They drove to Powell's house where he made a toll call to Martin, telling him the dirty work was done. When Goff returned at 10 p.m. she found blood on the carpet, shoes in the bathtub, and blood on Powell's jacket.

> Powell disposed of the jacket and the gun in a nearby dumpster scheduled to be picked up the following morning." (In re Martin, supra, 150 Cal.App.3d at pp. 156-157.) (Petn., App. A.)

ARGUMENT

I

THE PROSECUTOR DID NOT COMMIT "GRIFFIN ERROR" DURING CLOSING ARGUMENT

Petitioner first contends the prosecutor committed "Griffin error" (Griffin v. California (1965) 380 U.S. 609, by commenting that neither of the co-conspirators testified. (Petn., p. 22.) However, a careful analysis of the context in which the statement was made as well as the applicable law reveals the prosecutor did not violate the mandate of Griffin v. California, supra, in this case.

The defense strategy at trial was to attack the testimony of Andrew

Powell in every possible way. (See generally, RT 2263-2299.) Specifically, defense counsel told the jury if they did not believe Powell's testimony the prosecution's case no longer existed. (RT 2281.) As a response to defense counsel's argument, the prosecuting attorney told the jury about the role of circumstantial evidence in a conspiracy case.

> "The defense said many times that if Andrew Powell is not believed, there is no case. Let me suggest to you that is not true at all, not true at all. Let me read an instruction. 'It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an expressed or formal agreement. The formation and existence of a conspiracy may be inferred from all the circumstances tending to show the common intent, and may be proved in the same way as any other fact or by circumstantial evidence or by both direct and circumstantial evidence.' Let me

suggest that conspiracy, prosecution cases oftentimes include both conspirators as defendants and none of the conspirators testify. Let me suggest to you that you consider this case in that light for a while. Consider your job as finding whether or not Andrew Powell and Herman G. Martin are guilty of Count I, conspiracy to commit extortion and Count II and Count III and Count IV, both of them are sitting over here on trial. Neither one of them testified. No testimony from either of the coconspirators. You hear the evidence that you heard in this case with out Andrew Powell's testimony? Would you find him guilty?

"MR. MITCHELL: Your Honor, may we approach the bench?

"THE COURT: I don't see any necessity for it, Counsel. You may proceed.

"MR. MITCHELL: With all due respect, your Honor --

"THE COURT: You may.

"MR. MITCHELL: Thank you, sir.

(The following bench conference was reported.)

"MR. MITCHELL: Your Honor, the language was 'neither one of them testifies', and that is a direct comment on my client's failure to testify.

"MR. PIPPIN: That is not a comment.

"THE COURT: Pardon?

"MR. PIPPIN: This is what I said, and that is not a comment on that, and I wasn't making any reference to that at all. I was making an analogy. But there is no -- that they consider this case in terms of neither coconspirator testified, which is the circumstantial evidence.

"THE COURT: Without the facts from --

"MR. PIPPIN: Of the conspiracy.

"THE COURT: Right.

"MR. MITCHELL: Your Honor, may I make a motion for mistrial, which I assume will be denied?

"THE COURT: It will be denied, Counsel.

"MR. MITCHELL: thank [sic] you.

(The following proceedings were had in open court in the presence of the jury:)

"MR. PIPPIN: Hopefully, you just witnessed the last bench conference.

"Think about this case in those terms. Now, as I indicated yesterday, it is real easy to downgrade Andrew Powell and show that he is a liar, and then the defense says several times there is no case without Andrew Powell's testimony; if you dis-believe what he tells you, my client is absolutely not guilty. Is that right? I suggest to you that it is not.

"Look at this case like you were prosecuting both Powell and Martin for conspiracy that ended up in the murder of Richard Crake. What evidence do you have? We have got Powell with independent testimony going to Crake's house, trying to find him on May 8, going to the bad address, and a phone call from Powell to Martin's house that night.

"Now, Powell said he talked to Martin. That is what his testimony was. Take that out. You have got a phone toll that proves he

called him. If he wasn't going to Martin's house on behalf -- if he wasn't going to Crake's house on behalf of Martin, why did he call him?

"The same is true on the night of the murder. We know, we know that Powell went there and killed him, and we know he called Martin's house that night by a phone toll. Mr. Mitchell suggests that the testimony, the testimony about that from Andrew Powell, came from his reading police reports. Well, the phone toll isn't a police report. He called his house.

"You know all the motive evidence. That all comes in without regard to Andrew Powell's testimony. Andrew Powell didn't know the ins and outs of that lawsuit. He didn't know the threats that Herman Martin had made to Richard Crake. If all you had in this case was a circumstantial evidence that was presented without regard to Andrew Powell's testimony, would you be convinced beyond a reasonable doubt that Herman Martin put Powell up to what happened? Is there any other explanation for what Powell did?" (RT 2300-2303.)

In Griffin v. California, supra, 380 U.S. 609, the prosecutor had encouraged the jury to draw adverse inferences from the defendant's failure to respond to the testimony against him. The trial judge also had instructed the jury the defendant's failure to testify could be considered against the defendant. This Court held it is a violation of a defendant's constitutional rights to tell the jury in a state criminal trial that a defendant's failure to testify supports an unfavorable inference against him.

However, in Lakeside v. Oregon (1978) 435 U.S. 333, this Court made it clear that the mere fact the prosecutor comments on the fact a defendant has been silent does not constitute "Griffin error." Rather, this Court observed that,

> "It is clear from even a cursory review of the facts and the square holding of the Griffin case that the Court was there concerned only with adverse comment, whether by the prosecutor or the trial judge-- 'comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.'" (Lakeside v. Oregon, supra, 435 U.S. at pp. 338-339; emphasis added.)

Similarly, in Carter v. Kentucky (1981) 450 U.S. 288, 298, this Court again noted that "The Lakeside Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify . . . ." (Orig. emphasis.)

When one considers the context of the prosecutor's comments, it is evident the statements were not an adverse comment on the petitioner's failure to testify. Rather, the prosecutor was merely commenting on the fact

conspiracies are often difficult to prove as they must be proven by circumstantial evidence because the co-conspirators frequently do not testify.

The prosecutor thus did not directly comment on the petitioner's failure to testify or seek to comment adversely on this fact. Rather, the prosecutor was commenting on the state of the evidence and the prosecution's case under the circumstances. As there was no adverse argument made by the prosecutor on the ground the petitioner had not testified, but merely a comment on the state of the evidence, there was no Griffin error here. (Lakeside v. Oregon, supra, 435 U.S. 333; Carter v. Kentucky, supra, 450 U.S. at p. 298.)

Even assuming arguendo the prosecutor's comment could be considered

as Griffin error, petitioner is still not entitled to any relief as any conceivable error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.)

The comment of the prosecutor was brief and mild and not the type of comment which heavily emphasized the fact petitioner had chosen to remain silent. (People v. Vargas (1973) 9 Cal.3d 470, 471-480.) Moreover, the comment did not fill a gap in the prosecution's case or touch a live nerve in the defense. Rather, it was simply a matter of fact comment on the state of the evidence. (Id.)

The jury was also instructed not to draw any unfavorable inferences from the fact petitioner did not testify. (RT 2316.)

In addition, there is overwhelming evidence of petitioner's guilt here as found by the Court of Appeal. (Petn., App. A; In re Martin (1983) 150 Cal.App.3d 148, 163-164.)

> "Powell testified Martin solicited him to collect money and beat up Crake. Martin threatened Powell with jail and the loss of his job if he refused to participate. Martin obtained Crake's current address and gave it to Powell. Powell then went to Crake's house, demanded the money, assaulted Crake and killed him. Powell's testimony is corroborated by the testimony of his girlfriend and Martin's other employees. This evidence is sufficient to support conviction for conspiracy to commit extortion and conspiracy to commit assault with a deadly weapon.
>
> "Martin attempts to argue the murder and assault were not in furtherance of the conspiracy because Powell had withdrawn from the conspiracy. This argument is directly contradicted by Powell's testimony of the conversation and his activities the night of the murder. Even though at

times powell refused to comply with Martin's instructions there is no question but that Powell went to Crake's house the night of the murder, demanded the money, assaulted Crake and killed him. Even if Powell was reluctant at various times during the course of the planning stages of the crime, it is apparent he participated exactly as agreed, he so testified, and his testimony is corroborated by circumstantial evidence of other witnesses and the record of telephone calls between Powell and Martin the day and night of the murder.

"A co-conspirator is guilty of any crime committed by his confederate which is a natural or probable act committed in furtherance of the conspiracy or any crime which is one of natural and probable consequence of the object of the conspiracy. (People v. Brawley (1969) 1 Cal.3d 277.) The question of what constitutes a natural and probable consequence is one of fact for the jury. (People v. Drolet (1973) 30 Cal.App.3d 207, 217.)

"A reasonable jury could find the assault and murder were a natural and probable consequence of Martin's instructions to collect the money and

> beat up Crake, his giving Powell Crake's address and his providing a gun. Substantial evidence supports this jury's conclusions." (In re Martin, supra, 150 Cal.App.3d at pp. 163-164, fn. omitted.)

Accordingly, any conceivable "Griffin error" was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.)

As the Court of Appeal concluded:

> "Whether Griffin error is prejudicial depends upon whether the comment fills a gap in the prosecution's case or touches a live nerve in the defense. (People v. Medina (1974) 41 Cal.App.3d 438, 462; People v. Morse (1969) 70 Cal.2d 711, 730, cert. den. 397 U.S. 944.)
>
> "In this case the prosecution merely stated the obvious; he simply noted the difficulty proving a conspiracy is that it must often be proved by circumstantial evidence because the conspirators frequently do not testify.
>
> "It is hard to see the argument focused attention on

Martin's failure to testify by asserting that even without Powell's testimony, sufficient evidence supported a finding of conspiracy. The trial court's instructions telling the jury Martin's failure to testify could not be used to infer his guilt would have cured any potential harm from this limited comment." (Petn., App. A; In re Martin, supra, 150 Cal.App.3d at p. 166; fn. omitted.)

II

THE CONSTITUTION DOES NOT COMPEL TRIAL COURTS TO GRANT IMMUNITY TO DEFENSE WITNESSES SIMPLY BECAUSE THE WITNESSES POSSESS POTENTIAL EXCULPATORY INFORMATION FOR THE DEFENSE

Petitioner contends the Fifth and Sixth Amendments to the United States Constitution compel a trial court to grant defense witnesses immunity from

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prosecution where the defense witnesses have information helpful to the defense. (Petn., p. 37.)[1] This contention is meritless.[2]

Recently, this issue was presented in the case of Autry v. McKaskle (1984) ___ U.S. ____, 79 L.Ed.2d 906. This Court denied the petition for writ of certiorari in that case. However, the dissenting opinion of Justice Marshall, quoting from a Fifth Circuit decision, set forth the current state of the law within the federal system on this issue.

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1. Petitioner's argument only addresses the Sixth Amendment issue. However, his Questions Presented address both issues. (Petn., pp. i, 37.)

2. Penal Code section 1324 deals with prosecutorial grants of immunity. It is set forth in Appendix A.

"3. As the Fifth Circuit has noted:

"'The Supreme Court has not decided whether courts may grant defense witnesses use immunity, and the circuit courts which have addressed the issue have produced widely divergent opinions. On the question whether judicial use immunity is necessary for essential exculpatory testimony, the courts have split three ways. The Third Circuit . . . held that such immunity is available in certain circumstances. On the other hand, the Seventh, Eighth, and District of Columbia Circuits have ruled that such immunity is unavailable . . . The remaining circuits which have addressed the issue have denied immunity in the specific cases before them, but left open whether immunity would ever be available.' United States v. Thevis, 665 F.2d 616, 639 (1982) (citations omitted). Although the Fifth Circuit has never explicitly determined whether due process may require a trial court to grant a defendant use immunity, its decisions imply that courts lack such power under any circumstances. Id., at 639, n 25." (Autry v. McKaskle, supra, ___ U.S. ___, 79 L.ED.2d at pp. 907-908, fn. 3.)

A review of the cases from the various circuits reveals the better rule is that neither the Fifth nor Sixth Amendments compel a trial court to grant immunity to a defense witness simply because the witness may be able to offer exculpatory evidence.

First, with regard to a Sixth Amendment claim, it is well settled the Sixth Amendment does not, of its own force, place upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of immunity. (United States v. Turkish (2nd Cir. 1980) 623 F.2d 769, 774.)

Second, the claim under the Fifth Amendment must fail as well. One argument raised by the defense is the

need to equalize the powers of the prosecution and the defense. However, a criminal trial is not symmetrical as the prosecution and defense have different rules, powers, and rights. Thus, there can be no due process violation based on any alleged unfair advantage inuring to the government which may or may not grant use immunity to its witnesses and thereby indirectly impact on the defendant's ability to present a defense. The Fifth Amendment does not create general obligations for courts or prosecutors to obtain evidence protected by a lawful privilege. (United States v. Turkish, supra, 623 F.2d at pp. 774-775.)

The second argument under the due process clause is that the need to have all the truth told weighs in favor of allowing judicial grants of immunity. However, the Federal Constitution does

not require the government to assist the defense in extracting from others evidence the government does not have. (United States v. Turkish, supra, 623 F.2d at p. 775.) Moreover, the idea of total truth is not realistic given the fact much evidence is protected by privileges including the attorney-client privilege which protects the defense. (Id.)

Third, granting a witness use immunity does not significantly improve the legal position of the holder of the privilege as he is still technically subject to transactional prosecution. (United States v. Turkish, supra, at p. 775.)

However, it does impinge on many public interests, and may severely limit the ability of the state or federal government to prosecute cases.

As was noted in United States v. Turkish, supra, 623 F.2d at p. 775:

> "In the first place, while the prosecution remains theoretically free under Kastigar to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial. The Government has a 'heavy burden' to prove that its evidence against the immunized witness has not been obtained as a result of his immunized testimony. Kastigar v. United States, supra, 406 U.S. at 461, 92 S.Ct. at 1665. While this burden can be met by cataloguing or 'freezing' the evidence known to the Government prior to the immunized testimony, that technique is not available when continuing investigations disclose vital evidence after, though not resulting from, the immunized testimony. See SEC v. Stewart, 476 F.2d 755, 762 (2d Cir. 1973) (Timbers, J., dissenting). Moreover, to meet its burden of proving that prosecution of the immunized witness was not benefitted in any way by his immunized testimony the prosecutors most knowledgeable about an investigation may in some circumstances be obliged to forgo any further contact with the witness and

arrange for a new team of investigators and prosecutors to pursue the case against him. See United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).

"Secondly, awareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution. While the witness cannot prevent prosecution and secure an immunity 'bath' by broadening the scope of his answers, as he could if testifying under a grant of transactional immunity, his fulsome answers may substantially lessen the likelihood of any successful prosecution.

"Finally, there is considerable force to the Government's apprehension that defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators. Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at

> a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense. The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied upon to prevent such tactics." (United States v. Turkish, supra, 623 F.2d at p. 775.)

Finally, and perhaps of major import, allowing the court to make a determination as to the grant of immunity breaches the fundamental separation of powers between the court, the prosecutor, and the defense. At defense request, the court would place itself in the position of evaluating the prosecution's case, witnesses, the crimes that had been committed, and determining whether individuals should or should not be prosecuted. This allows the defense

and the court to manage criminal prosecutions. However, this is something that citizens of this country expect local prosecutors to decide.

Moreover, there is something troubling about a court evaluating the prosecution's case and potential witnesses before deciding to grant or deny immunity and then sitting either as the trier of fact or trial judge. No matter how well intentioned the trial judge, and even if the trial is heard by a different judge, the result inevitably places the judiciary in the position of having made a prosecutorial decision in favor of or against one of the parties to the criminal trial. (See, e.g., United States v. Thevis (5th Cir. 1982) 665 F.2d 616, 640.)

Accordingly, for these reasons, the better rule is that the

trial court should not be vested with any authority to grant immunity.

Many federal decisions have supported this position. Trial courts need not grant immunity to defense witnesses simply because the witnesses possess potential exulpatory information available from other sources. (United States v. Gottesman (11th Cir. 1984) 724 F.2d 1517, 1524; Autry v. Estelle (5th Cir. 1983) 706 F.2d 1394, 1400-1401, cert. denied ___ U.S. ___ 79 L.Ed.2d 906; United States v. Heffington (5th Cir. 1982) 682 F.2d 1075, 1081; United States v. Carlin (11th Cir. 1983) 698 F.2d 1133, 1136; United States v. Thevis, supra, 665 F.2d at pp. 638-640.)

It is also clear that nothing under California law required the court here to grant the defense witnesses any judicial use immunity. (People v.

Sutter (1982) 134 Cal.App.3d 806, 813-816; In re Martin, supra, 150 Cal.App.3d at p. 161 (Ptn., App. A.)

In addition, while individual states or federal jurisdictions may wish to vary the power of a trial court to control prosecutorial grants of immunity, this seems to be a matter for each state or federal jurisdiction to decide. It does not appear to be a matter that is compelled by either the Fifth or Sixth Amendments.

It must also be noted the cases petitioner cites to support his argument are actually not helpful in this case. In United States v. Morrison (3d Cir. 1976) 535 F.2d 223), the Court of Appeal concluded due process may demand the government grant a witness use immunity where prosecutorial misconduct caused the defendant's principal

witness to withhold testimony out of fear of self-incrimination. In Morrison the prosecutor repeatedly threatened a potential defense witness with prosecution and conducted a highly intimidating interview with her in his office. In essence, the prosecutor coerced the witness into taking the Fifth Amendment to protect herself.

Nothing of this sort happened here. Although petitioner throws the term misconduct about liberally, no argument was ever made in the trial court that the prosecutor committed misconduct with regard to the three defense witnesses at issue or that this fact compelled the court to grant immunity. The defense simply argued the court should grant immunity to three witnesses because they could help the

defense. (RT 2059-2060, 2140-2144, 2144-2154.)

Petitioner here does complain of prosecutor misconduct; however, not with regard to these witnesses. Rather, he claims they were indirectly intimidated because another defense witness was arrested after testifying. However, the record belies this assertion. The record reveals that, without advising the prosecutor or the court in advance, defense counsel had the witness -- Steve Aguilar -- testify in the presence of the jury that he gave Powell the murder weapon, got it back, and got rid of the gun. (RT 1899-1972.)

Once the witness for the first time admitted in the presence of the jury he was an accessory to murder, the prosecutor had no choice but to arrest him. However, the fault here was with

defense counsel for not making an offer of proof before the witness testified so the court and the prosecutor could determine whether the witness should testify out of the presence of the jury. Indeed, the court chided defense counsel the next day for what, in essence, was his own impropriety in this matter not the prosecutor's. (RT 1991-1997.)

Thus, the prosecutor did not commit any misconduct which intimidated any of the three witnesses petitioner sought to have granted immunity. Consequently, the Morrison case does not assist petitioner.

The other case petitioner primarily relies on is Government of Virgin Islands v. Smith (3d. Cir. 1980) 615 F.2d 964. There the court held there may be a duty to grant immunity where a defense witness can offer

exculpatory evidence if the government has no strong interest in withholding use immunity. The court then remanded the case for a hearing to let the district court weigh the countervailing interests.

That case is distinguishable for several reasons. First, it was a simple robbery case and the government may not have had any legitimate basis for denying immunity. Here the prosecutor was facing the possibility of granting immunity to individuals who may have aided in a murder or been accessories to a murder.

Moreover, while the language of Smith is very broad, the case itself arose in a situation similar to the Morrison case where there was some suggestion of prosecutor misconduct. The Virgin Islands Attorney General's

office had offered to give the witness at issue immunity. Out of courtesy the United States Attorney was contacted for consent. However, for some unexplainable reason, that agency refused to go along with the decision to grant immunity. (Government of Virgin Islands v. Smith, supra, 615 F.2d at p. 967.)

Thus, the Smith case is also not compelling on its facts. Indeed, in United States v. Lord (9th Cir. 1983) 711 F.2d 887, which petitioner cites, the United States Court of Appeals for the Ninth Circuit indicates the primary basis for the holding in Smith was prosecutorial misconduct. (Id., at pp. 891-892.)

> "The Herman court did not order immunity because no evidence of prosecutorial misconduct appeared there. The first application of the Herman standard occurred in Virgin Islands v. Smith, 615 F.2d 964

(3d Cir. 1980.) In Smith the court determined that the record revealed a prima facie showing of prosecutorial misconduct. There the local juvenile authorities had exclusive jurisdiction over an essential defense witness. Although the local authorities agreed to immunize the witnesses, they made the offer of immunity contingent on the consent of the United States Attorney, the official entrusted with statutory authority to make such a grant. For reasons unexplained either at trial or on appeal, the federal prosecutor refused to consent, and the potentially exculpatory testimony was not presented to the jury. The Third Circuit ordered the district court to hold an evidentiary hearing to determine whether the defense witness's testimony would be relevant to the defendant's case and whether the federal prosecutor, in refusing to consent to extending immunity to the defense witness, acted with a deliberate intention of distorting the fact-finding process. Id. at 969. If the district court found that prosecutorial misconduct had prevented the defense witness from giving relevant testimony, then the court was directed to acquit the defendant unless the prosecutor

> granted use immunity to the defense witness." (United States v. Lord, supra, 711 F.2d at pp. 890-891.)

The same point is made in Grochulski v. Henderson (2d Cir. 1980) 637 F.2d 50, 52-53, with regard to Smith. In addition, the Lord decision notes that Smith dealt with a situation where the witness at issue clearly would have exonerated the defendant. (Id., at p. 891, fn. 2.) Such a situation is not presented here. The witnesses may have aided the defense, but none of them would have clearly exonerated petitioner.

Finally, the decision in Lord, like Smith, is based on prosecutorial misconduct, and not some general requirement the defense witnesses be given immunity. (Grochulski v. Henderson, supra, at p. 892.) Consequently, the

Lord decision is not helpful to petitioner in this case where there was no real evidence of prosecutor misconduct with regard to the witnesses who claimed the privilege.

Thus, none of the cases petitioner heavily relies on to support his position have any applicability to this case.

Finally, mention must be made of survey of the law in this country in the most recent edition of American Law Reports. There it is noted that absent some special circumstances such as prosecutor misconduct or some unusual equity weighing in the favor of the defendant, the defense simply cannot require a trial court to grant immunity to a defense witness.

"Sec. 2. Summary and comment

"It is generally accepted, as a reality of the process of criminal prosecution, that, on occasion and where the need of the government will be served thereby, immunity from prosecution may be granted to a codefendant or other prosecution witness in exchange for testimony regarding the crime under investigation. The avowed purpose of such immunity is to permit the state to compel necessary testimony for the purpose of effecting criminal prosecution in circumstances where the absence of such testimony would lead to the release of suspected individuals to the detriment of society.

"As a general rule, however, the defendant in a criminal prosecution has not been afforded a similar opportunity to compel testimony of witnesses. This denial has been based on a variety of grounds and has few exceptions. Thus, for example, the courts have declined to extend to the defendant the right to grant, or to compel the prosecution to grant, immunity from prosecution to defense witnesses on the grounds that such right is vested solely in the prosecution as a result of legislative grant and that neither the court nor the defendant, acting alone or in concert,

could compel the prosecution to exercise its authority.

"Similarly, the courts have been reluctant to accept constitutional justification for extending the capacity to immunize witnesses. This refusal has withstood specific constitutional arguments, such as that the refusal to allow a defendant to compel immunity for defense witnesses was a denial of due process of law or the denial of the defendant's right to present his own witnesses. Likewise, arguments that the defendant, as a result of the refusal to extend immunity to defense witnesses, has been denied a fair and equal trial have met with little success in the courts. It should be noted, however, that there is some judicial authority for upholding a grant of immunity to a defense witness where prosecutorial conduct was so flagrant that the basic fairness of the trial was put into question. However, such courts have sometimes required that there be an affirmative showing that some action on the part of the prosecution, in addition to the withholding of immunity from a defense witnesses, [sic] would deny the defendant a fair and equal trial absent the grant of such immunity.

"There is an additional line of support, among the commentators, for the proposition that defense witnesses should be granted the limited form of use and derivative use immunity where to do so would not adversely affect the prosecution's ability to subject these witnesses to future prosecution. The factual circumstances envisioned by the commentators would occur where the prosecution had ample additional evidence with which to pursue the witness and where the denial of immunity would preclude the defendant's exercise of his Sixth Amendment right to present witnesses. It should be noted, however, that the main direction of these arguments is equitable, and there is no authority for the proposition that the defendant has an affirmative right to compel the grant of immunity in any instance. This being the case, some additional factor would seem necessary to support the defendant's claim for immunity as being essential to a fair and equal trial. Thus, although use and derivative use, rather than transactional, immunity constitutes a sufficient substitute for Fifth Amendment protection, the courts have been reluctant to extend the immunity power

> beyond the legislatively mandated purpose of enabling the prosecutor to properly perform the duties of his office." (4 A.L.R.4th, pp. 620-621; fns. omitted.)

Accordingly, as there was no evidence of any any serious misconduct by the prosecutor in this case and no real authority for the court to grant immunity to defense witnesses, petitioner's contentions here are meritless. (United States v. Hunter (10th Cir. 1982) 672 F.2d 815, 818; State v. Cheadle (N.M. 1983) 681 P.2d 708, 712-713; State v. Jeffers (Ariz. 1983) 661 P.2d 1105, 1125-1126.)

III

THE PROSECUTOR DID NOT COMMIT ANY MISCONDUCT WHICH RENDERED THE TRIAL FUNDAMENTALLY UNFAIR

Petitioner finally contends this Court should grant a petition for writ of certiorari because of three

instances of prosecutor misconduct. (Petn., p. 56.) In making this argument petitioner neglects to consider simply alleging prosecutor misconduct is not enough to warrant the granting of relief in the federal court system where a state court trial is being reviewed. Rather, it must be shown from evaluating the totality of the circumstances that the conduct rendered the trial fundamentally unfair. (Donnelly v. DeChristoforo (1974) 416 U.S. 637; Angel v. Overberg (6th Cir. 1982) 682 F.2d 605.)

> "The first instance complained of occurred during the questioning of Deputy District Attorney Charles Hayes.
>
> "Q: Did that deal with things in his background?
>
> "A: That's right.

/

/

"Q: What was Martin's response?

"A: Well, I specifically asked him whether he had any connection with Department of Justice.

"Q: Did he tell you the answer to that?

"A: He said, yes, he did. He was connected with the Department of Justice. I asked him whether he was acquainted with the Mafia activities in New Jersey and he said -- " (Petn., App. A; In re Martin, supra, 150 Cal.App.3d at p. 166.)

The court sustained a defense objection to the question and advised the jury to disregard the question. (RT 1629.) It is clear the asking of a question which may have resulted in some inappropriate information coming before the jury did not render the trial fundamentally unfair. In a case where petitioner was charged with murder and conspiracy, the jury would hardly be

prejudiced or the trial fundamentally impaired by a vague reference to the Mafia. Moreover, the Court of Appeal concluded the jury understood the cautionary instruction of the court and applied this instruction. (Petn., App. A; In re Martin, supra, 150 Cal.App.3d at p. 165.)

Petitioner also complains of two comments made by the prosecutor during closing argument. At one point during closing argument the prosecutor analogized petitioner's control of his witness to the picture on the cover of the book control of his witness to the picture on the cover of the book "The Godfather." The prosecutor also analogized the testimony of Powell to that of Jimmy Fratianno. Neither of these comments during closing argument had any fundamental impact on the fairness of

the trial and do not warrant this Court granting petitioner any relief.

As the Court of Appeal noted in disposing of these two claims by petitioner:

> "During closing argument the district attorney attempted to discredit defense testimony by an illustration "inspired" by the cover of the book The Godfather:
>
> "'Okay. Well, I want to talk about the credibility of some witnesses for a little while, and I am reminded of a popular book that came out a few years ago, and it was also a successful movie; a book called "The Godfather". I am reminded of that book, at least the cover, the cover of that book. I don't know if any of you read it, but the cover of that book has the name on it, and I can't remember exactly what it is. It is either a hand or some figure, and there is strings going down to the words and the name, I think, like a puppet; like a person pulling the strings on a puppet. A vision of the cover of that book came to my mind when some

defense witnesses testified in this case.

"'For example, Marcia Sharpe. She is the daughter of the defendant. Okay. She got on the stand as a defense witness, and the defense pulled a string for April 6. Her testimony was, April 6 my father was on a couch about 9:30 in his office and had to be taken to the doctor. That is the response the April 6 string got.

"'Okay. I cross-examined her, tried to cross-examine her about that. I pulled an April 7th string, or April 6th string. "Who else was there?" "I don't remember." "Was Powell around?" "I don't remember." "When did your father come back to work?" "I don't remember." This is just because the wrong person was pulling the strings.'

"Even though this illustration was unnecessary and may have been offered in bad faith, it does not amount to a dishonest act or an intent to persuade the jury by deceptive, reprehensible means. (People v. Strickland (1974) 11 Cal.3d 946, 955.) Furthermore, in order to preserve this argument on appeal an objection must be made when the comment

is made in order to give the trial judge an opportunity to cure any harm caused by the comment. (People v. Green (1980) 27 Cal.3d 1, 27, 34.) No such objection was made here and an admonishment could have cured any potential prejudicial effect of the illustration.

"Martin last complains of the prosecution's analogy of Powell's testimony to the testimony of Jimmy Fratianno: 'So, you know it is not hard in a case like this, in any conspiracy case, to run down the credibility of, or the character of, one of the coconspirators. People who conspire together to commit crimes are not decent, good, law-abiding, upstanding people. When one of them gets on the stand and testifies, it is easy to run down their credibility.

"'Let me give you an example of a guy who has been in the press recently, Jimmy Fratianno. The guy has been a crook all his life. He has been a hit man. Okay? He has testified. [At this point in response to defense objection a bench conference was held and the prosecutor instructed to forego this illustration.]'

> "This incomplete analogy was abandoned after a bench conference and this limited comment could not in any way have affected the verdict following this month-long trial." (Petn., App. A; In re Martin, supra, 150 Cal.App.3d at pp. 166-167.)

Thus, none of petitioner's complaints here is of the magnitude that would warrant granting of relief by a federal court. Furthermore, they do not fit within the guidelines of this Court for the grant of a review on guidelines of this Court for the grant of a review on certiorari. The factual allegations of prosecutor misconduct do not involve a federal question or an important question of federal law which require resolution by this Court. (See Rule 17, Rules of the Supreme Court.)

Finally, it must be noted that petitioner was charged with rather serious crimes here and there was

over-whelming evidence of his guilt, as noted earlier. Under these circumstances two or three inappropriate comments or questions could not have had any affect on the verdict of the jury. Thus, any conceivable error was harmless under any standard of prejudice.

* * * * *

CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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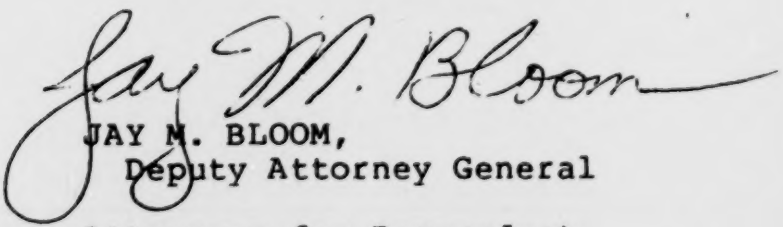

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APPENDIX A

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California Penal Code

"Sec 1324. Self-incrimination; order compelling testimony; exemption from prosecution; perjury, false swearing, contempt, etc.

"In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence

produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order.

"After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in

answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

"Sec. 1324.1. Self-incrimination; misdemeanor; agreement; immunity from prosecution

"In any misdemeanor proceeding in any court, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, the person may agree in writing with the district attorney of the county, or the prosecuting attorney of a city, as the case may be to testify voluntarily pursuant to this section.

"Upon written request of such district attorney, or prosecuting attorney, the court having jurisdiction of the proceeding shall approve such written agreement, unless the court finds

that to do so would be clearly contrary to the public interest. If, after court approval of such agreement, and if, but for this section, the person would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with such agreement, he answered or produced evidence, but he may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or in producing evidence in accordance with such agreement. If such person fails to give any answer or to produce any evidence in accordance with such agreement, that person shall be prosecuted or subjected to penalty or

forfeiture in the same manner and to the same extent as he would be prosecuted or subjected to penalty or forfeiture but for this section."

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No: 83-2062
October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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For Delivery to Hon. Donald W. Smith

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 2 day of October, 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 2, 1984.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 2nd day of October, 1984.

Vida W. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 28, 1986